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CURRENT TOPICS.

In the case of *Commonwealth v. McDuffy*, argued at the January term, 1879, of the Supreme Judicial Court of Massachusetts, the question was raised whether the offense of obtaining property by false pretenses can be committed when the party charged obtains no more than is rightfully due him, by whatever fraudulent means or devices he thus obtains it. The defendant, McDuffy, was indicted for obtaining money by false pretenses from one Sweetser. There was evidence tending to show that Sweetser was indebted to the defendant, and the latter offered evidence of the exact amount of such indebtedness, but the court refused to admit it. The defendant asked the court to instruct the jury: "1. If McDuffy only received, at the time of the settlement with Sweetser, money enough to pay what was actually due him, then this indictment cannot be maintained. 2. If McDuffy made representations only for the purpose of getting the money due him, and not for the purpose of obtaining money not due him, then this indictment cannot be maintained." The court declined to give these instructions. The full court, LORD, J., delivering the opinion, say: "This leads to an inquiry into the essential elements of the offense. In Com. v. Drew, 19 Pick. 179, Morton, J., says that to constitute the statute offense, four things must occur: 1. There must be an intent to defraud. 2. There must be actual fraud committed. 3. False pretenses must be used for the purpose of perpetrating the fraud, and 4. The fraud must be accomplished by means of the false pretenses made use of for the purpose; and in Com. v. Jeffries, 7 Allen 568, Bigelow, C. J., says: 'The intent to defraud is part of the substance of the issue, and must be proved.' * * * In Rex v. Williams, 7 C. & P. 354, C, a servant of B, obtained property belonging to A by means of falsehood, to enable B to obtain payment of a debt owed by A; and it was held that if C did not intend to defraud A, but only to enable B to obtain what was due him, he could not be convicted." The cases of People v. Thomas, 3 Hill 169; Com. v. Henry, 22 Penn. 253; People v. Getchell, 6 Mich. 496; People v. Genung, 11 Wend. 18, and II. Russ. Cr. p. 312; Bishop's Cr. L. I., § 525, II., § 442, were also cited, after which the learned judge proceeds: "We are of course not to be understood as deciding that a mere pretense of indebtedness by the person from whom the property is obtained is sufficient, nor is anything which we decide to be construed as in conflict with the well established rule of law that a party is to be presumed to intend all the natural and ordinary consequences of his acts, and fraud and falsehood are always evidence to show that the party had a dishonest purpose; and the question for the jury to decide is, whether upon all the facts and circumstances the defendant had an intent to defraud, and effected that purpose, and whether in order to accomplish it he made use of fraudulent representations, and succeeded by means of such representations. We think, therefore, that the defendant should have been allowed to offer evidence in support of the facts upon which his prayers are predicated, and the jury should have been instructed that if proved, the defendant was entitled to an acquittal."

THE question of the liability of a book canvasser to his subscribers was before the United States Circuit Court for the Northern District of Illinois in the recent case of *Stoddard v. Warren*. The defendant was a canvasser as the agent of plaintiff, the publisher of the Philadelphia reprint of the Encyclopedia Britannica. After the British publishers arranged for the sale of the original work in this country, plaintiff refused to fill agent's orders for defendant's subscriptions except for cash, whereupon defendant induced a number of his subscribers to take the English edition, and took back their volumes; and then claimed to set off against plaintiff's demand his damages for loss on the volumes returned to him and for profits on subscriptions not exchanged. The court held that under the contract the plaintiff was bound to subscribers upon the subscriptions obtained by defendant, and the defendant, if liable at all, was only so as a guarantor, or where bad faith was shown, and that therefore he had no

right to take back volumes and recover the difference from the publisher. BLODGETT, J., said: "The question is, had the defendant the right to obtain a cancellation of the orders he had secured for plaintiff's book, and substitute orders for the British book, and charge the expense of so doing to the plaintiff? Upon this question I am very clear that he had no such right. The orders in question had been obtained by the defendant as the plaintiff's agent. Both parties, we may say, had an interest in them. The defendant could not, without the consent of the plaintiff, secure the cancellation of those orders, and charge the plaintiff with the expenses he incurred in so doing. This would be a wrong toward the plaintiff, who had the right to the benefit of these orders to the extent to which they had been taken. The defendant contends that he was obliged to do this in order to protect himself from the contracts he had made with his subscribers, and which he was unable to fill by reason of the plaintiff's refusal to sell him books on credit to fill them with. It seems to me, however, that two courses lay open to the defendant in this emergency: first, to have paid the plaintiff cash for the books required to fill the orders which he had taken, for I do not think the plaintiff was bound to give the defendant credit for stock after the defendant had broken the contract; or, secondly, to have turned these orders over to the plaintiff and allowed him to fill them on proper terms of equity between them. I do not agree with the defendant that he was in such peril from the contracts which he had made with these subscribers as to justify the course he took in cancelling this large number of them. The contracts with the subscribers are, in my opinion, binding contracts upon the plaintiff himself, made by the plaintiff's duly authorized agent, the defendant, and it is at least doubtful to my mind whether the defendant is personally liable on them at all. In any event, he is only liable in the nature of a guarantor, or where bad faith is shown. It seems to me it would be a sufficient answer by Mr. Warren to any subscriber who demanded books according to the terms of the subscription to refer the subscriber to the plaintiff, and demand of the plaintiff, in behalf of such subscriber, that he should fulfil the contract which Mr. Warren had made with the subscriber as Stoddart's agent." See on the subject of the contracts of canvassers, Hathaway v. Bennett, 10 N. Y. 108; Depew v. Keyser, 3 Duer, 335; Kline v. Low, 11 Johns. 74; Ewing v. Johnson, 34 How. Pr. 202.

ABANDONMENT AND ITS EFFECT.

The act of abandoning a vessel by the insured, or his agents or assigns, when accepted, has, in law, all the effect of a valid assignment. The underwriter then stands in the place of the assured, and all that can be saved from destruction he is legally entitled to. The masters of vessels, in the absence of the owners, have unlimited control of the vessels. This is the case, whether the vessel is a sea-faring one or used in inland navigation, or the coasting trade. It is now well settled by numerous authorities, both English and American, that in cases of necessity happening during the voyage, the master is, by law, the agent of all parties concerned, and under such circumstances acts done by him, and done in good faith, exercising sound judgment, are binding on all parties in interest. The Sarah Ann, 2 Sum. 256; New England Ins. Co. v. The Sarah Ann, 13 Pet. 387. When there is imminent danger, or when the vessel is so damaged as to justify a sale, he, from the necessity of the case, becomes the agent of the underwriters equally with the owner, and is bound to effect the sale for the common benefit of both his principals. If he has authority to sell the vessel in case of injury, he by necessary implication has authority to do all acts which his own good judgment may dictate to save her from total destruction. Such is his duty. He can not abandon his vessel in case of impending danger, without first using all the skill, exertion and prudence at his command to save her from destruction. And where a vessel is stranded, it is obligatory on the master to take all possible care of the cargo. The Niagara v. Cordes, 24 How. 7. In case of capture by a vessel of a belligerent power of a neutral vessel, the master of the neutral vessel is bound to remain on board of her until she is condemned, or until there is no hope of recovery. Willard v. Dorr, 3 Mason, 161.

In case of the stranding of a vessel, and where considerable damage is thereby caused, or great expense would be incurred in remov-

ing her off the strand, the master is justified in abandoning her. In the case of the Sarah Ann, *supra.*, it is said: "I agree at once to the doctrine that it is not sufficient to show that the master acted in good faith, and in the exercise of his best discretion. The claimants on whom the *onus probandi* is thrown, must go further, and prove that there was a moral necessity for the sale, so as to make it an urgent duty upon the master to sell, for the preservation of the interest of all concerned. And I do not well know how to put the case more clearly than by stating that if the circumstances were such that an owner of reasonable prudence and discretion, acting on the pressure of the occasion, would have directed the sale, from a firm belief that the brig could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value, as she lay upon the beach, then the sale by the master was justifiable, and must be deemed to be made by a moral necessity. And I consider this to be the doctrine deducible from the case of Gordon v. Massachusetts Fire and Marine Insurance Company, 2 Pick. 249, where the subject is examined very much at length and with great ability."

No writing or any particular form of words is necessary to constitute a valid abandonment. But where the act of abandonment relied upon by the assured to fix the liability of the underwriters is a mere matter of inference and depends on some equivocal act, the courts are not inclined to hold it as a valid abandonment.

When the abandonment is properly made, it is *ipso facto* a transfer of all the property, or any part thereof, when only a part remains, to the underwriters; and, as far as it is covered by the policy, the abandonment gives them title to it. Columbia Insurance Company v. Ashby, 4 Pet. 139; Patapsco Insurance Co. v. Southgate, 5 Pet. 604; Chesapeake Insurance Co. v. Stark, 6 Cranch. 268. Since the rights of the assured and the underwriters are definitely fixed by the abandonment, when that is made, and made valid, and so that neither party can revoke the same without the consent of the other, it is necessary that the act operating as an abandonment be decisive. This is particularly the case in the navigation of rivers. On the high seas, the fact of the submersion of a vessel affords *prima facie* evidence that the vessel is a total loss. Such is not the case with steamboats, or other water crafts navigating the rivers of the country; the water being of an almost universal shallowness, so as not to afford the presumption that a boat submerged was a total loss. In such a case, an abandonment by an act of the assured must clearly appear.

Under the present practice in admiralty in the lake and river districts, there comes to our view the question of damages arising from the negligence or *laches* of the underwriters after a valid abandonment by the assured. It is, at the present time, customary with most of the underwriters who issue policies on steamboats navigating the lakes and rivers, to incorporate in the said policies a stipulation giving them the option, in cases of abandonment, to pay the amount of the policy or to raise and repair the boat. Under such a stipulation, when the underwriter notifies the party insured that he will undertake to raise and repair the boat, he must, with all possible dispatch, make all the necessary repairs and tender her imediately to the owner. The rule with regard to seafaring vessels is, that the repairing must be expedited so that the voyage may not be broken up if not completed. Peele v. Suffolk Ins. Co., 7 Pick. 254; Rynolds v. Ocean Ins. Co. 22 Pick. 191.

There is a difference between vessels on the high seas and river navigation, in this, that during many months of the year branches of some rivers and parts of others are not navigable because of the shallowness of the water, while during other months the largest water craft may safely navigate them. Therefore, it seems that in such a case where a vessel is delayed, after an abandonment to the underwriters for repairs, so that the owner is thereby prevented from making an intended voyage because of unpropitiousness of the season, the underwriter should take the consequences as in case of the breaking up of an incomplete voyage by the same negligence and delay.

C. M. D.

In *Harmonia Association v. Hickey*, 11 Ch. L. N. 274, a case growing out of the railway strikes of 1877, it is held by McAllister, J., of the Chicago Circuit Court, that the constitutional provision allowing assemblies of the people, is the guarantee of an inherent right with which the power of the State can not interfere.

STATUTES OF LIMITATION—PERSONAL LIABILITY OF STOCKHOLDERS.

MILLS v. SCOTT.

Supreme Court of the United States, October Term, 1878.

1. THE STATUTE OF MARCH 16, 1869, requiring actions for the enforcement of rights of individuals under acts of incorporation or by operation of law, which accrued prior to June 1, 1865, to be brought before the 1st day of January, 1870, does not affect claims against estates when the State law gives a certain time for administrators to ascertain the condition of the estate and creditors to file their claims.

2. A COURT OF EQUITY IS THE PROPER TRIBUNAL to ascertain the proportion of the indebtedness which should be charged to a stockholder on his personal liability.

In error to the Circuit Court of the United States for the Southern District of Georgia.

MR. Justice FIELD delivered the opinion of the court:

This is an action at law against the administrator of the estate of George Hall, deceased, upon bills of the Merchants and Planters' Bank of Savannah, Georgia, amounting to over one hundred thousand dollars. The deceased was, on the 1st of January, 1860, and up to the time of his death, the owner of one thousand shares of the capital stock of that bank, of the nominal value of one hundred dollars a share. A clause in the charter of the bank provided that "the persons and property of the stockholders" should be liable for the redemption of its bills and notes at any time issued, in proportion to the number of shares held by them. The plaintiff was the owner of the bills in suit, and as they were not paid on presentation, he brought an action upon them against the bank in the Circuit Court of the United States for the Southern District of Georgia, and recovered judgment, upon which execution was issued and returned unsatisfied. He then brought this action to charge the estate of the deceased, Hall, under the provision of the charter mentioned.

To the declaration the defendant pleaded the general issue and the statute of limitations of March 16th, 1869, requiring actions for the enforcement of rights of individuals under acts of incorporation or by operation of law, which accrued prior to June 1st, 1865, to be brought before the 1st of January, 1870, or be forever barred. To the special plea the plaintiff interposed a demurrer, and it was agreed in arguing it that the following facts should be considered as set forth in the plea, namely: that George Hall was domiciled in Connecticut and died there in 1868, leaving a will; that there was no administration in Georgia on his estate until August 9th, 1869, when letters of administration *ad colligendum* were granted to the defendant, Mills, and that permanent letters of administration, with the will annexed, were granted to him on June 7th, 1869.

The court sustained the demurrer and struck out the plea. The case was then tried upon the general issue, and the plaintiff obtained a verdict for the sum of $100,000, of which sum $31,354 was to be made out of the property of the deceased, then in the hands of the administrator, and the remainder out of the property which might subsequently come into his hands. Upon this verdict judgment being entered, the defendant brought the case to this court on a writ of error.

The principal questions presented for our consideration are: 1st, whether the statute of March 16th, 1869, is a bar to the action; and 2d, whether an action at law by a billholder to charge a stockholder will lie under the charter of the bank; and if so, whether the declaration will sustain the finding of the jury.

The statute of March 16th, 1869, was intended to bring all claims to an early determination. It was passed, as recited in its preamble, on account of the confusion which had "grown out of the disturbed condition of affairs during the late war," and because of doubts entertained relative to the law of limitation of actions "which should be put to rest." It was a measure well calculated to bring disputed controversies to a speedy settlement. The time prescribed within which actions were to be brought was only nine months and fifteen days. In the case of Terry v. Anderson, 95 U. S. 628, it was held by this court that the act was not open to any constitutional objection because of the shortness of this period. The question in such cases, the court said, was whether the time allowed was, under all the circumstances, reasonable, and of this the legislature of the State was primarily the judge, and its decision would not be overruled unless a palpable error had been committed. Looking at the circumstances under which the legislature had acted, amidst the disasters which had affected the fortunes, property, and business of almost every one in the State, the court could not say that the time mentioned was unreasonable. "Society demanded," observed the Chief Justice, "that extraordinary efforts be made to get rid of old embarrassments and permit a reorganization upon the basis of the new order of things;" and for that purpose, whilst the obligations of old contracts could not be impaired, "their prompt enforcement could be insisted upon or an abandonment claimed."

There is in the statute no exception in terms of any class of cases; yet such a construction must be given to its provisions as not to impair the operation of other laws, which it is not reasonable to suppose the legislature intended to repeal. The law of the State relating to the administration of the estates of deceased persons contains various provisions, which in many particulars would be defeated if the statute of March 16, 1869, was held applicable to actions in behalf of the estates or against them. Thus, administrators are allowed twelve months from the date of their qualification to ascertain the condition of the estates confided to their charge; creditors are required to present their claims within this period; and no suits to recover a debt of the decedents can be brought until its expiration. §§ 2,530, 2,548 and 3,348. The

supreme court of the State has accordingly held that the statute of 1869 does not affect this exemption from suit for the period designated, but that its spirit and equity require that suits against administrators upon the claims mentioned should be brought within a similar period after twelve months from the grant of administration, that is, within nine months and fifteen days afterwards. Such is the purport of its decision in Moravian Seminary v. Atwood, 50 Ga. 382: Edwards v. Ross, 58 Ga. 147, and that decision has since been followed in several cases. Lane v. Morris, 8 Ga. 476–7; Dozier v. Thornton, 19 Ga. 329. In conformity with them we must hold that the statute was not a bar to the present action. There was no administrator of the estate of Hall appointed in Georgia, even for temporary purposes, until April 9, 1869, and this action was commenced December 30, 1870, which was within the period required after the expiration of the year of exemption.

Whether the present action can be maintained, it being an action at law by a billholder to charge the estate of a deceased stockholder, depends upon the construction given to the clause of the charter of the bank, prescribing the personal liability of the stockholders. The language of the clause, so far as it bears upon this case, is that "the persons and property of the stockholders shall at all times be liable, pledged and bound for the redemption of bills and notes at any time issued, in proportion to the number of shares that each individual and corporation may hold and possess." This provision is held by the supreme court of the State to create a personal liability on the part of the stockholder for all the notes of the bank in the proportion that the shares held by him bear to all the shares of its capital stock, which any billholder can enforce, upon the insolvency of the bank, by separate action to the extent of his claim. Lane v. Morris, 8 Ga. 476–7; Dozier v. Thornton, 19 Ga. 329. Such liability may undoubtedly be enforced by a suit in equity, and in many cases such a proceeding would seem to be the only appropriate one, as was held by this court in Pollard v. Bailey. 20 Wall. 520; See also Terry v. Tubman, 92 U. S. 161. The proportion of the indebtedness with which the stockholder is to be charged can be ascertained only upon taking an account of the debts and stock of the bank, and a court of equity is the proper tribunal to bring before it all necessary parties for that purpose. But by the law of the State, as declared by its highest tribunal, an action for debt will lie where the amount of the bank's outstanding indebtedness and the number of shares held by the stockholder can be stated. In such cases, the extent of the latter's liability is fixed, and the amount with which he should be charged is a matter of mere arithmetical calculation. Actions for debt will always lie where the amount sought to be recovered is certain or can be ascertained from fixed data by computation. Here the declaration states the number of shares of capital stock of the bank to be twenty thousand, and that one thousand were held by the deceased. His liability, therefore, was fixed at one-twentieth of the entire indebtedness of the bank on the bills issued by it, which is averred to be eight hundred thousand dollars. The only recovery, therefore, which the declaration permitted was for forty thousand dollars and not for one hundred thousand, which the jury found. This error in the record is not specifically pointed out in the brief of counsel of the defendant, who was not present at the argument; but it is evident that it was at the erroneous apportionment of the indebtedness to the estate of the deceased that he aimed, when insisting that the remedy of the plaintiff should have been by a bill in equity, and not in this form of action.

Be this as it may, where an error in the amount recovered is apparent upon the record, and it could not have been remedied by an amendment of the pleadings, this court will of its own motion, in the interests of justice, direct that it be corrected, and if necessary, order a new trial or further proceedings for that purpose.

This cause will, therefore, be remanded to the court below with directions to grant a new trial, unless the plaintiff, within a period to be designated by the court, consent to remit from the judgment the excess over forty thousand dollars.

JURISDICTION OF FEDERAL COURTS OVER OFFICERS OF A STATE.

HANCOCK v. WALSH.

United States Circuit Court, Western District of Texas, April, 1879.

A circuit court of the United States has jurisdiction of a suit brought against an officer of a State who is so using his official position as to invade rights secured to the complainant by the Constitution and laws of the United States.

WOODS, Circuit Judge:

This is not a suit against the State of Texas. In the case of Osborn v. Bank of the United States, 9 Wheat. 738, it was held that, "in deciding who are parties to the suit, the court will not look beyond the record; that making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest, and that a State can be made a party only by shaping the bill expressly with that view, as when individuals or corporations are intended to be put in that relation to the case." The doctrine of this case was approved in the later case of Davis v. Gray, 16 Wall. 203. See also Dodge v. Woolsey, 18 How. 331; State Bank of Ohio v. Knoop, 16 How. 369; Ohio Life and Trust Company v. Debolt, 16 How. 432; Mechanics and Traders' Bank v. Debolt, 18 How. 380; and Jefferson Branch Bank v. Skelly, 1 Black, 436.

This suit is brought, not against the State, but against an officer of the State, who, it is alleged, without the authority of any valid law of the State is, by an unwarranted assumption of power, so using his official position as to invade rights secured

to complainant by the Constitution and laws of the United States. This is the very case put by the Supreme Court of the United States in Osborn v. Bank of United States, *supra*, where it is decided that "a Circuit Court of the United States may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of complainant." To the same effect are the cases of Davis v. Gray, *supra*, and Board of Liquidation v. McComb, 2 Otto, 541.

It appears from the bill that Mercer concluded with the Republic of Texas a contract of colonization; that he performed its conditions; that rights have accrued to him and his associates; that these rights have been ascertained and fixed as to quantity and character; that he and his associates have a vested interest in the lands described in the contract, and that the State of Texas now holds the nominal legal tie only, and that the defendant is violating his official duty as land commissioner by issuing to strangers certificates of title to lands which are in fact the property of complainant and his associates.

Is it within the power of the State of Texas to disregard the contract made by Mercer with the Republic of Texas? If it is not, then if the commissioner of the general land office is invading the rights of Mercer or his successors under the contract, either with or without the apparent authority of the legislature, his acts should be restrained by this court.

The Supreme Court of Texas, in the case of Melton v. Cobb, 21 Tex. 530, has held that the contract of the Republic of Texas with Mercer was a valid contract. The court, in that case, declares the legislative recognitions of the contract must be deemed to have put the question of its validity at rest. It was therefore binding upon the Republic. It was a grant of lands upon a condition subsequent, which condition the bill avers has been performed. It created an obligation on the part of the Republic to convey the legal title to the lands as soon as the conditions had been performed. It was a liability of the Republic, which held the title to lands which it had contracted to convey, and for which the consideration has been paid in full. It was as complete and binding a liability as a sovereignty could assume. And the debates in and action of the convention of 1845, convened to frame a constitution for the State of Texas, show that these colonial contracts, including Mercer's, were regarded as liabilities of the Republic. See debates of the Convention of 1845, pp. 610, 614, 616, 618, 620, 623, 627, 628, 630, 633, 640, 644.

Now, what is the relation of the State of Texas to this liability? By the first of the joint resolutions passed by the Congress of the United States for annexing Texas to the United States (5 Statutes at Large, 797), it was declared that "congress doth consent that the territory properly included within and rightly belonging to the Republic of Texas may be erected into a new State, to be called the State of Texas, with a republican form of government, adopted by the people of said Republic by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union." The second of said joint resolutions declared "that the foregoing assent of congress is given upon the following conditions, to wit: * * Second. Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, * * * and all other means pertaining to the public defense belonging to the Republic of Texas, shall retain all the public funds, debts, etc., * * * and all the vacant and unappropriated lands lying within its limits to be applied to the payment of the debts and liabilities of the Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as the State may direct, but in no event are said debts and liabilities to become a charge upon the government of the United States."

These resolutions, on July 4, 1845, were accepted by an ordinance which passed the convention with but one dissenting vote, which was signed by every member of the convention, and which, after reciting the resolutions, declared. "Done in order to manifest the assent of the people of this Republic, as required in the above recited portions of said resolutions, we, the deputies of the people of Texas, in convention assembled, in the name and by their authority, do ordain and declare that we assent to and accept the proposed conditions and guarantees contained in the first and second resolutions of the Congress of the United States aforesaid." Hartley's Digest, 44, 47. On the faith of the acceptance of these resolutions, Texas was admitted as a State into the union of States. Is it now within the power of Texas to refuse compliance with any of the conditions imposed by these resolutions?

It seems to me to be clear that it is not. The passage of the resolutions by the Congress of the United States, and their acceptance by the deputies of the people of Texas, constituted either a treaty or a contract. It probably cannot be considered as a treaty, because it was not made by the President, by and with the advice and consent of two-thirds of the Senators present, as prescribed by section 20, article 2, of the Constitution, unless the long acquiescence of all departments of the government gives it the force and effect of a treaty. Whether it be a treaty or a contract, it is alike within the clause of the Constitution of the United States which forbids a State from impairing the obligation of contracts. Green v. Biddle, 8 Wheat. 92. If it is to be considered a treaty, it is protected by that second clause of article 6 of the Constitution of the United States, which declares: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." If this is a treaty, the Legislature of Texas can no more repeal or annul it than it can repeal or annul a clause in the Constitution of the United States. If it is to be considered as a contract, it is equally beyond the power of the legislature; for a State is as much forbidden by the

Constitution from passing laws to impair the obligation of contracts made by herself as by other parties. By no device that a State can resort to can she escape this constitutional prohibition. It is perfectly clear that she can not authorize her agents to violate her own contracts by leaving it to their discretion whether they shall violate them or not.

All that the complainant asks in this case is that an officer of the State of Texas may be enjoined from invading his rights by a disregard of the compact made by the State of Texas, on the faith of which she was admitted as a State of the Union.

The State of Texas has never repudiated the contract made with Mercer. On the contrary, it has been pronounced valid and binding by her supreme court, as we have seen in Melton v. Cobb, *supra*. The act of the Legislature of Texas of February 2, 1850 (Hartley's Digest, 702), is the only act to which we have been referred that gives authority to any one to issue certificates to be located within the Mercer colony, and those were to be issued, not generally, but only to settlers in the colony who were entitled to lands under the Mercer contract, and not by the commissioner of the general land office, but by a special commissioner appointed by the Governor, who was to hear proof and determine what colonists were entitled to the lands. This is a recognition, rather than a repudiation of the contract.

There is no act of the Legislature of Texas directly imposing upon the commissioner of the general land office the duty of issuing certificates for location within the Mercer colony, and if there were it would be null and void. Nor have we been referred to, or have we been able to find, any act which clothes the commissioner of the general land office with judicial or *quasi* judicial functions in regard to the issue of certificates and patents. He is, in regard to these duties, a ministerial officer only.

The ground assumed by complainant, that, by reason of the facts stated in the bill, the State of Texas becomes a trustee for him and his associates, seems to be well taken. A State may become a trustee. Perry on Trusts, sec. 41. The contract between the Republic of Texas and Mercer was a grant of lands to Mercer upon a condition subsequent, which, according to averments of the bill, were performed. The legal title remained in the Republic, which thereby became a trustee for Mercer and his associates. Wash. on Real Property, 525, *et seq*. On the execution of the contract, Mercer took a vested estate, defeasible only on the non-performance of the condition.

This trust imposed upon the Republic of Texas was not extinguished by the formation of the State of Texas, and her annexation to the Union, but was imposed and fastened upon the State as the sovereign successor of the Republic. New Orleans v. United States, 10 Pet, 736; United States v. Smith, 10 Pet., 331, 335; United States v. Arredondo, 6 Pet., 691; Lessees of Pollard's Heirs v. Kibbe, 14 Pet., 390. The State of Texas, therefore, is in the same plight, as regards the rights of Mercer and his associates, as the Republic was, and holds the relation to them of trustees to *cestuis que trust*. We have already seen that the State of Texas, by her own express consent, given in the most solemn manner, agreed to hold the public domain of the Republic and apply it to the extinguishment of the liabilities of the Republic. She therefore becomes a trustee for the parties to whom the Republic was liable, not only by operation of law, but also by her own express contracts.

This is an express trust which is defined to be a trust created by instruments that point out, directly and expressly, the property, persons and purposes of the trust. Perry on Trusts, sec. 24. If the State were, therefore, a party to this suit, it would not be competent for her to set up lapse of time, or any defense analogous to the statute of limitations to protect her from being called on to execute the trust. For, as between trustee and *cestui que trust*, in the case of an express trust, such as this, the statute of limitations has no application, and no length of time is a bar. Perry on Trusts, sec. 836, and cases cited.

Much less can an officer of the State—who, according to the averments of the bill, is, by his acts, done without warrant of any valid law of the State, invading the rights of the beneficiaries of a trust assumed by the State—plead the lapse of time against the enforcement of the trust.

But, even if the defendant were in a position to set up the defense of lapse of time against the relief prayed by the bill, I think the averments of the bill offer reasonable excuse for the delay in bringing the suit, and it is the law of this State that when such excuse is offered, the court will not apply the limitation. McKin v. Williams, 48 Tex. 89.

It is objected that the bill is not sworn to. The want of verification of the bill is not ground of demurrer. If the bill is not sworn to, the court will not allow an injunction to go unless its averments are sustained by evidence. The laws of Congress, of the Republic and of the State of Texas, and the facts of public history, of all of which the court takes judicial notice, and the exhibits to the bill, sufficiently establish its averments.

The foregoing discussion has covered all the grounds of demurrer, and, in the opinion of this court, none of the grounds are well taken.

This is not a suit against the State, nor does not seek to deprive her of the power of disposing of her own land in her own way, for the lands which the complainant seeks to appropriate are not the property of the State.

The relief sought by the bill may be properly granted by a court of the United States, and the complainant is not compelled to seek his rights through the political department of the State government, to which he and his predecessors have, according to the bills, repeatedly appealed in vain.

The acts of the defendant against which relief is prayed are purely ministerial acts. Any law which authorized the defendant to disregard the contract of the State is null and void, and therefore is not binding in law. If the defendant violate a provision of the contract protected by the

Constitution of the United States, it is immaterial whether he is doing it with or without the apparent sanction of a law of this State, and no claim that defendant is performing an official duty will avail him.

The averments of the bill make a case of the highest equity, which imperatively demands the interference of this court to prevent irreparable injury to the complainant and his associates. The complainant seeks to enforce an express trust, which no lapse of time can render stale.

The case seems to run on all fours with the case of Davis v. Gray, *supra*, which went up from this district, and in which the Governor of the State and the Commissioner of the General Land Office were enjoined from isssuing patents for lands within the territory granted by the State of Texas to the Memphis and El Paso Railroad Company. The conclusion seems inevitable that the demurrer must be overruled and that the injunction should go as prayed in the bills. And it is so ordered.

RIPARIAN RIGHTS.

SLOAN v. BEIMILLER.

Supreme Court of Ohio, December Term, 1878.

[Filed March 18, 1879.]

1. THE RULE OF THE ENGLISH COMMON LAW that owners of land situate on the banks of non-tidal streams, though navigable in fact, are owners of the beds of the rivers to the middle of the stream, is not applicable to the owners of land bounding on Lake Erie and Sandusky Bay.

2. THE RIGHT OF FISHING in Lake Erie and its bays is not limited to the proprietors of the shores; and the right of fishing in those waters is as public as if they were subject to the ebb and flow of the tide.

3. THE PRIMA FACIE RIGHT of the public is not rebutted by proof of the mere uninterrupted enjoyment of the privilege of fishing for the period requisite to perfect a title by prescription; the mere lawful exercise of a common right for that period does not establish an exclusive right.

4. WHEN NO QUESTION ARISES in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce as do not obstruct navigation, the boundary of land in a conveyance calling for Lake Erie and Sandusky Bay, extends to the line at which the water usually stands when free from disturbing causes.

5. A DEED CONVEYING LAND contained a reservation in the following terms: "And the said grantee shall not have the right to sell or remove sand from said premises, nor shall he have the right of fishing in either the lake or the bay, the same being expressly reserved by the said grantor. The said grantee shall have the right, however, of landing on either the bay or lake shore for other purposes than to take sand, fish, or carry to and from seines and fishing tackle, all of which rights are exclusively reserved by the grantor, so that he may lease the same or sell the same." *Held* (1.) That the attempted exclusion of the grantee by the first clause of the reservation from the right, disconnected from the above, of fishing in either the lake or bay, is inoperative. (2.) The right reserved to the grantor is the exclusive right of landing on either shore to take sand, fish, or to carry to and from the shore seines and fishing tackle to be used in the adjacent waters in direct connection with the shore; and the inhibition against the carrying of fishing tackle to and from the shore by the defendant, has reference to tackle to be used in connection with the shore in contravention of the right reserved to the grantor, and does not forbid the storing of tackle on the premises conveyed which is not thus used.

Reserved from the District Court of Erie County.

H. Goodwin, for plaintiff in error; *Jos. M. Root*, *W. G. Lane* and *M. A. Dougherty*, for defendant in error.

WHITE, J., delivered the opinion of the court:

The first question arising in this case is, whether the plaintiff in acquiring title to the part of Cedar point not occupied by the United States, thereby became invested with the exclusive right to the fisheries in Lake Erie and Sandusky Bay opposite the premises thus acquired.

The plaintiff's claim is, in substance, that as owner of the land on the lake and bay shore, he had the right to control these fisheries to the middle of the bay and lake. This claim is sought to be supported upon the doctrine of the common law of England that in streams above the ebb and flow of the tide, the ownership of the soil to the center of the stream is presumed to be in the adjoining proprietor, and that the right of fishing in such stream is not public, but is vested exclusively in the adjoining owners.

Whether the doctrine of the common law, which regards all non-tidal streams that are in fact navigable, as mere highways, and as non-navigable in law, is applicable to the condition of things in this country has given rise to much discussion, and contrariety of decision. In some of the States this doctrine of the common law is repudiated as inapplicable to the circumstances of this country; and streams, without regard to the ebb and flow of the tide, which are navigable in fact are regarded as navigable in law. Tyler's Law of Bounderies, 53 *et seq.*; Houck on Rivers, chapters 3 and 6, where the subject is discussed and the authorities collected; Railroad Company v. Schurmeir, 7 Wall. 272.

It has, however, been held in this State, as is the case in most of the States, that the owners of land situate on the banks of fresh-water navigable streams are owners of the beds of the rivers, to the middle of the stream, as at common law. Gavit v. Chambers, 3 Ohio, 496. The same doctrine has been recognized in subsequent cases. Lamb v. Rickets, 11 Ohio, 311; Walker v. Board of Public Works, 16 Ohio, 544.

We are not called on in this case to review the doctrine laid down in Gavit v. Chambers. The question before us is whether the rule there laid down as applicable to navigable rivers, applies to the owners of land bounding on Lake Erie and Sandusky Bay. In our opinion it clearly does not. In Canal Commrs. v. People, 5 Wend. 423, Chancel-

lor Walworth said: "Our large fresh water lakes or inland seas are wholly unprovided for by the law of England. As to these, there is neither flow of the tide nor thread of the stream; and our local law appears to have assigned the shores down to ordinary low water mark to the riparian owners, and the beds of the lakes, with the islands therein, to the public." And in Kent's Commentaries it is laid down thus: "In this country, our great navigable lakes are properly regarded as public property, and not susceptible of private property any more than the sea." 3 Kent's Com. 429, note a. The doctrine thus stated is fully supported by the adjudged cases: State v. Gilmanton, 9 N. H. 461; State v. Company, 49 N. H. 250; Fletcher v. Phelps, 28 Vt. 257; Austin v. Rutland R. Co. 45 Vt. 215; Champlain, &c. R. Co. v. Valentine, 19 Barb. 485; Ledyard v. Ten Eyck, 36 Barb. 102; People v. Gutches, 48 Barb, 656; Wheeler v. Spinola, 54 N. Y. 377; West Roxbury v. Stoddard, 7 Allen, 167.

In Seaman v. Smith, 24 Ill. 521, the question was as to the location of a boundary line calling for Lake Michigan in the various deeds in a chain of title. It was held, that the line at which the water usually stands when free from disturbing causes is the boundary of land in a conveyance calling for Lake Michigan as a line. In the opinion it is said: "A grant giving the ocean or bay as the boundary, by the common law, carries it down to ordinary high-water mark. Cortelyou v. Brundt, 2 J. R. 357." * * * "The principle, however, which requires that the usual high-water mark is the boundary on the sea, and not the highest or lowest point to which it rises or recedes, applies in this case, although this body of water has no appreciable tides." * * * "The portion of the soil which is only seldom conveyed with water may be valuable for cultivation or other private purposes."

We are not required, in this case, to consider any question in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places, in aid of commerce, as do not obstruct navigation. It was held, in Dutton v. Story, that these rights of the riparian owner apply to the lakes as well as to the tide waters. 1 Black. 23; see also, Austin v. Rutland R. Co., 25 Vt. 215.

The question here is whether the right of fishing in the lake and bay is limited to the plaintiff as the proprietor of the shores. "Fishing in the sea, and in the waters which are made to flow inland therefrom by its egress and influence, constituting, as it does, a great source of sustentation, has, in all ages and in all countries, been deemed of such importance, that it has ever been regarded as a privilege open and common to all purposes." Angell on Tide Waters, 124. And although the dominion over, and the right of property in the waters of the sea and its inland waters were, at common law, in the crown, yet they were of common public right for every subject to navigate upon, and to fish in, without interruption. Id. 21. They are regarded as the inherent privileges of the subject and "classed among those public rights denominated *jura publica*, or *jura communica*, and thus contradistinguished from *jura coronæ*, or private rights of the crown." Id. 22, 80; Hargr. Law Tracts, 11. The sovereign was the proprietor of these waters as the representative or trustee of the public. In this country, the title is vested in the States upon a like trust, subject to the power vested in Congress to regulate commerce. Martin v. Waddell, 16 Pet. 367, 412; McCready v. Virginia, 94 U. S. 391, 4 Cent. L. J. 578.

That fishing in such waters as Lake Erie, and its bays, should be as free and common as upon tide waters, and alike subject to control by public authority, is obviously just. The reason for regarding the right as public is as great in the one case as in the other, and we have no hesitation in saying that the right of fishing in these waters is as open to the public as if they were subject to the ebb and flow of the tide. The Supreme Court of New Hampshire, in speaking of Lake Winnipiseogee says: "The right of fishing in the lake is not limited to the proprietors of the shore, but is common to all citizens of the State, just as much as the fishery in the tide waters of the Piscataqua." State v. Company, 49 N. H. 250.

The plaintiff likewise claims a right to the fisheries in question by prescription. It appears from the finding of the master that, from October, 1849, up to the time of making his report, the owners of Cedar Point "leased the same to sundry persons, and the fisheries belonging thereto," and that Cedar Point was regularly under lease during all that time for fishing purposes, except when the owners themselves fished there, and that the owners controlled the same except when interfered with by the defendant, and some times by other fishermen during the four or five last preceding years. In the spring of 1866, the defendant ceased to fish under lease from the owners of the Point. At that time he commenced to carry on his fishing operations in his own right; and, in the following year, May 4, 1867, the present suit was commenced. Fishing with pounds was commenced about the year 1854. Prior to that time fishing was carried on with seines used in connection with the shore.

These facts clearly fail to establish a prescriptive right to the fisheries in controversy. The time is insufficient, even if the other facts necessary to support the claim were shown. The *prima facie* right of the public is not rebutted by the proof of the mere uninterrupted enjoyment of the privilege of fishing for the period requisite to acquire a title by prescription; the mere lawful exercise of a common right for that period never having been considered as conferring an exclusive right. Angell on Tide Waters, 135, 270; D. & M. R. Co. v. Stump., 8 G. & J. 497; Chalker v. Dickenson, 1 Conn. 382; Id. 510; State v. Company, 49 N. H. 240.

The next question is as to the extent of the reservation contained in the deed from the plaintiff to the defendant. The reservation is in the following terms: "And the said grantee shall not have the right to sell or remove sand from said premises, nor shall he have the right of fishing in either the

lake or the bay, the same being expressly reserved by the said grantor. The said grantee shall have the right, however, of loading on either the bay or lake shore for other purposes than to take sand, fish, or carry to and from seines and fishing tackle; all of which rights are exclusively reserved by the grantor, so that he may lease the same or sell the same." The word "loading" should doubtless be read *landing*. Landing is the word used in the contract, in fulfillment of which the deed was made; and the reservation is regarded by counsel as containing the word *landing* instead of "loading," and it will be so treated by us.

In determining the effect of the reservation, it may be remarked, in the first place, that it can operate to reserve to the grantor only such rights as would have passed from him to the grantee by the deed in the absence of such reservation. It does not abridge the rights held by the grantee independent of the deed; nor does it enlarge the rights of the grantor beyond what they were before the execution of the deed. The attempted reservation in the first clause of the right of fishing in either the lake or bay, disconnected from the shore, is, therefore, inoperative.

The question is as to the extent of the reservation contained in the last clause. In giving construction to this clause it is to be observed, that all the estate and interest in the land is vested in the grantee, subject only to the rights reserved to the grantor. No right is denied to the grantee in respect to his use of the land, except in so far as such right is saved to the grantor. The right is denied to the grantee of landing on the bay or lake shore to take sand, fish, or to carry to and from the shore seines and fishing tackle. The right reserved to the grantor, therefore, is the exclusive right of landing on either shore to take sand, fish, or to carry to and from the shore seines and fishing tackle. He can land on or occupy the shore for no other purpose. It is claimed on behalf of the defendant, that the reservation is repugnant to the grant and is therefore void. We do not think so. The rights reserved might be granted by the owner of the premises upon which they were to be exercised; and if they could be granted, there is no reason why they might not be reserved, a reservation being but the equivalent of a grant.

The plaintiff not being entitled to relief in respect to the fisheries, which is the main subject of controversy, the only remaining question is whether there has been such an invasion of his shore rights as to entitle him to a decree for their quiet enjoyment. We find nothing in the case to show that the plaintiff or his grantee has been prevented from landing on the shore for the purposes specified in the reservation; nor is their right to do so denied by the defendant. He sets up no interest adverse to the rights reserved to the plaintiff.

It appears from the report of the master that at times the fishermen of the defendant live on the premises; and that in the fishing season, they take their boats, go to the pounds and lift the fish, which they take to Sandusky, and then return to Cedar Point and draw their boats on the shore and remain there until the next morning. This course is continued during the fishing season. When the fishing season is over the boats, stakes and twine are sometimes stored on the premises. The right is not reserved to the plaintiff to have his fishermen live on the premises; nor is there reserved to him any right of storing fishing tackle there. His right to the shore is limited to taking sand, fish and to the carrying to and from the shore fishing tackle to be used for fishing in the adjacent waters in direct connection with the shore. And the inhibition against the carrying of fishing tackle to and from the shore by the defendant, has reference to tackle to be used in contravention of the right reserved to the plaintiff; and does not refer to the storing of tackle on the premises, which is not thus used.

The master's report also shows that sometimes when the ice in the bay was unsafe, the fishermen would pull the sleds, on which the twine was, ashore for safety; and that at one time, in the winter of 1867–8, the defendant helped to draw the twine ashore. Whether the fishermen were authorized by the defendant to so use the shore does not appear. He sets up no claim to the use of the shore for such purpose; and in his answer he denies to have so used it. The finding that on one occasion the defendant used the shore for the purpose is not a sufficient ground on which to found a decree to quiet title. The act is to be regarded rather in the nature of a temporary trespass, than as the operation of a right. Moreover, the act of the defendant now in question, constituted no part of the cause of action set up in the petition, the act having been done after the commencement of the action.

We find, therefore, that plaintiff is not entitled to the relief prayed for, and his petition is dismissed.

BOND SIGNED ON CONDITION—NOTICE TO OBLIGEE.

HALL v. SMITH.

Court of Appeals of Kentucky, March, 1879.

1. BOND SIGNED BY SURETY — CONDITIONAL AGREEMENT.—A bond can not be avoided at the instance of a surety upon the ground that he signed it under a conditional agreement with the principal made at the time of signing it which the latter had failed to carry out, unless the obligee had notice of the agreement at or before his acceptance of the obligation, or had knowledge of such facts and circumstances as to the rights of the surety as would place a prudent man on inquiry.

2. NOTICE TO OBLIGEE — CASE IN JUDGMENT.—The defendant signed his name as surety on a bond, in the body of which the names of J H and W L H were inserted as sureties, on the condition that they should become jointly bound with him as sureties. The bond was then delivered by him to his principal for the purpose of obtaining their signatures, but the principal instead of doing so induced G W and W W H to sign

the bond, and in that condition it was delivered to and accepted by the obligee. *Held*, that the defendant was not liable. The fact that the bond on its face purported to be the bond of those who had never executed it was sufficient to put a prudent man on inquiry, and was notice to the obligee of the condition on which the defendant had signed it.

Wm. Stone Abert and *W. R. Kinney*, for appellants; *P. B. Muir* and *R. J. Meyler*, for appellee.

PRYOR, J., delivered the opinion of the court:

This action was originally instituted in the Bullitt Circuit Court, and by change of venue, was heard in the Jefferson Court of Common Pleas. It is based on the following writing:

"WHEREAS, B. S. Hall has this day been appointed by the Bullitt County Court of Kentucky deputy sheriff of said county; now we, B. S. Hall, principal, and Lewis Hall, Minor Hall, *W. L. Hall*, *James Hall*, S. M. Hobbs, C. A. Collins, his sureties, do hereby undertake and covenant to James F. Smith, sheriff of Bullitt county, Kentucky, that said B. S. Hall, deputy sheriff aforesaid, shall well and truly perform the duties of said deputy sheriff and pay over to the persons so entitled, all sums of money or other property that may come to his hands, and shall account for and pay over to said Sheriff Smith all taxes which he, said Hall, may collect. We expressly undertake that said B. S. Hall, deputy sheriff, as aforesaid, shall save said Smith from all loss and damages which he may sustain by reason of the acts of said B. S. Hall, deputy sheriff as aforesaid." Sept. 18, 1871.

G. Wolfe, B. S. HALL,
Wm. W. Hall, LEWIS HALL,
S. M. HOBBS,
C. A. COLLINS.

Lewis Hall, whose name appears as a surety on the bond, was the father of the principal obligor, B. S. Hall, and died prior to the institution of this action. His administrator being sued, pleaded *non est factum*, and before the hearing the action as to him was dismissed. James Hall and W. L. Hall, whose names appear in the body of the bond as sureties, never signed or executed the paper; and the names of G. Wolfe and Wm. W. Hall seem to have been substituted.

The appellant, S. M. Hobbs, filed in the court below a special plea of *non est factum*, in which it is alleged in substance that the defendant Hobbs signed the bond upon the express condition and agreement that all of the parties named as sureties in the bond were to sign it before delivery, of which fact Smith, the obligee, had notice; that he agreed to become bound as a joint surety on the bond with the parties therein named, and on no other condition, and the same was not binding until it had been fully executed. It was not attempted upon the hearing to show that Hobbs ever waived his right to have the bond executed by James Hall and W. L. Hall, or to assume the responsibility in conjunction with other parties whose names seem to have been substituted as sureties.

The bond was in the hands of the principal obligor, and the names of James Hall and W. L. Hall inserted in the body of that instrument at the time Hobbs affixed his signature, and when signed was delivered as it now appears to the appellee, the sheriff, and by him accepted as an indemnity against any loss he might sustain by reason of the acts of the principal obligor, B. S. Hall, who had qualified as his deputy.

The testimony conduces to establish the fact that Hobbs signed the paper on the condition that the parties whose names are inserted in the bond should become jointly bound with him as sureties; and the instrument, when thus signed, was delivered to the principal obligor in order that he might obtain their signatures, and the latter, instead of obtaining the signatures, induced Wolfe and Wm. W. Hall to sign the paper, and in that condition it was delivered to and accepted by the appellee.

An instruction was offered by counsel for Hobbs, to the effect that, if he signed the bond as an escrow, or if he signed the bond and delivered it to B. S. Hall, the principal obligor, on condition that he was to procure the signatures of the parties named in the instrument as his joint sureties, and that B. S. Hall failed to do so, it was an incomplete undertaking on the part of Hobbs, and not binding upon him, although delivered to the appellee; that the writing itself was notice to the appellee of the terms on which Hobbs had agreed to become liable. This instruction was refused, of which the appellant, Hobbs, complains.

There was a special finding by the jury, at the instance of the appellant, sustaining his defense, and also a finding that the appellee, Smith, had no notice or knowledge of any of the conditions upon which appellant signed the writing, at or before the time of its delivery to him by the principal obligor.

The court below told the jury in substance that, in the absence of such notice, the finding must be for the appellee.

That the writing was delivered by Hobbs to the appellee as an escrow constituted no defense, was settled by this court in the case of Millett v. Parker, 2 Metc. 610. In that case the bond was:

"We undertake and bind ourselves unto W. L. Parker, that W. B. Vansant will perform his part of the contract of dissolution of partnership between the said Vansant and Parker, and that he will save him harmless therein.

"April 1, 1856. WM. B. VANSANT,
F. MILLETT."

Millett, the surety, pleaded, and the testimony established the fact, that the obligation was handed to the obligor, Vansant, by the surety, with the express agreement and condition that it was to be taken by him to one Beverly, to be executed by him as a surety also, and was not to be a binding obligation until that was done. This court said, on an appeal by the surety, Millett, the writing having been delivered without Beverly's signature, that a writing delivered to, or held by one of the obligors, imposed no obligation on any of the parties signing it, so long as it remained in the obligor's possession, while an escrow could not be revoked by the party making it, and the one in whose favor it is made is entitled to the obligation whenever he complies with the conditions upon which it is to be delivered.

The obligors retaining the possession of the ob-

ligation, may destroy or cancel it at any time, as it has never become obligatory, for the want of delivery and acceptance by the party for whose benefit it was made.

It is also said in that case (p. 617): "A surety, by putting his name to the paper and leaving it in the possession of his principal, enables him to make use of it, and impose on a person who is ignorant of the secret agreement between the obligors. In such a case, the surety trusts to the promises of his principal; he does not deliver the writing to him as an escrow," etc. This principle was recognized by this court in the case of Bank of the Com. v. Curry, 2 Dana, 142; Smith v. Moberly, 10 B. Mon. 266; Whitaker v. Crutcher, 5 Bush. 621; Murphy v. Hubble, 2 Duv. 247, and in many others that might be cited.

It is maintained by counsel for the appellant that the doctrine announced in these cases has no application to the case under consideration, because the appellee had notice from the bond itself that it was an incomplete instrument, and appellant's liability made to depend upon its execution by the parties named in the body of the bond as his co-sureties. It is well settled that a conditional signing by a surety can not affect the rights of the obligee, unless he has notice of the existence of such an agreement between the principal and his surety before he accepts the obligation, and the negligent obligor or surety must be made to suffer and not the innocent payee. The principal in an obligation, however, can not exercise unlimited power to change or alter the stipulations of the contract because he is entrusted with the duty, or given the right by the surety to deliver it to the obligee. When the contract is complete when signed by the surety, the authority given to the obligor to deliver does not imply any authority on his part to change its terms.

It is no longer the obligation of the surety, if a material alteration is made without his consent, and in cases where the obligation or contract is perfected and the surety attempts to rely on a defense existing by reason of some agreement between himself and the principal obligor, made at the time of the signing, it is well settled that it cannot affect the rights of the obligee or prevent his recovery, unless he had notice of the agreement at or before his acceptance of the obligation, or was in the possession of such facts and circumstances with reference to the rights of the surety as would place an ordinarily prudent man on inquiry. The same rule also applies where the paper is blank as to dates, amounts, stipulations, etc., and is intrusted with the obligor to fill up the blank or to insert the terms and conditions of the agreement. In all such cases the doctrine "that he who trusts must lose," prevails, and as between the surety and an innocent holder the surety must bear the loss.

Counsel for the appellee rely on the cases of Terry v. Hazlewood, 1 Duv. 104, and Jones v. Shelbyville Fire Ins. Co. 1 Metc. 58, as sustaining the judgment of the court below. In the first named case, Terry and Bell were the joint sureties as they supposed, with T. T. Stockton, on a bond to the Commonwealth. It was made to appear that the signature of T. T. Stockton was a forgery, and Terry and Bell resisted a recovery against them on the ground that they signed the obligation believing the signature of their co-surety was genuine, and agreed to become liable jointly with him and in no other manner. This court held the surety liable on the ground that the co-surety was in no wise instrumental in obtaining the surety, and the writing having been delivered as a complete instrument without notice of any wrong, it was the negligence or fault of the surety in trusting his principal and he must therefore suffer. The obligee practiced no fraud on the sureties, and they had been deceived by those they trusted; in fact, the signature of Terry and Bell to the paper was evidence to the obligee when the paper was delivered that it was the genuine signature of all the parties to it. The obligee had the right to presume that the sureties would not assume the liability without knowing who had or was to become liable with them, and as one of two innocent parties must suffer, one whose negligence continued to the last must bear it. There are cases, however, taking a different view of this question, and upon the same fault indicate that the surety would be released. See Seeley v. People, 27 Ill. 173. The obligation delivered by Stockton was perfect, and the obligee was without notice of the fraud or the existence of any fact that would place an ordinarily prudent man on inquiry, and for this reason we do not regard the case as analogous to the one before us.

The case of Jones v. Shelbyville Ins. Co., is the strongest case in support of the views presented by counsel for the appellee. In that case, the names of Parish and Ratcliffe were inserted as the sureties of Staples in the body of the note. Ratcliffe signed the paper as surety, and Parish failing do so, the signature of Jones was procured as a co-surety without Ratcliffe's consent, and the name of Parish, after or at the time the note was delivered to the agent of the obligee, was erased from the body of the note, and that of Jones inserted. Whether the name was erased in the presence of the agent of the company does not appear, but it is expressly held that if the appellee had notice of the agreement with Ratcliffe, it released him from liability. The reasoning of the court in that case is in harmony with all the previous decisions of this court on the questions involved, and if the principal obligor erased the names of some of the sureties inserted in the note when in an incomplete state, without the knowledge of the obligee, the latter had the right to presume that he had authority to do so; that it had been done by the consent of the parties whose names were then affixed to the paper.

In the case under consideration the names of those who were to become the co-sureties of the appellant, Hobbs, were inserted in the body of the bond, and the obligation delivered and accepted by the obligee in that condition. The principal obligee had qualified, or was about to qualify, as the deputy of the appellee, who was then the sheriff of the county of Bullitt. The deputy was required to indemnify his principal, and the appel-

lant agreed to become jointly bound with the parties named in the bond as the surety of the deputy. He knew their relation to the deputy, the ability of each one of the parties to assume his part of the loss, in event of any, and was willing to share the responsibility with them. He had signed an obligation by which he had undertaken, in conjunction with the parties named in the bond, to become liable to the appellee. He had the right to prescribe the terms upon which his liability was to depend, and, when not trusting so as to mislead or deceive others, is entitled to the letter and spirit of his undertaking. He might have been willing to bind himself jointly with the parties whose names were on the bond, and unwilling to waive this right in order that other names might be substituted. He had the right to believe that the parties named as sureties would become bound with him, the instrument, when signed by him, being complete except the signatures. If, when the deputy made default, they had signed the bond, the liability of appellee would have been lessened, or he could have required them to share the loss. It is not pretended that the appellee must be denied a recovery in the absence of notice as to the conditions upon which appellant was to become liable. This notice may be actual, or such as would place an ordinarily prudent man on inquiry. This rule has its application to commercial paper; and while mere evidence of the existence of fault that might lead to an inquiry, by which the fraud could be discovered, is not sufficient to invalidate a negotiable instrument, the rule has never been applied so strictly to non-negotiable instruments but as to either—where the facts would satisfy one of ordinary prudence and judgment of the infirmity of the paper—no recovery can be had. Goodman v. Simonds, 20 How. 343; Bank of America v. Woolfolk, 10 Bush. 504; Blakey v. Johnson, 13 Bush. 197.

In this case, the bond was delivered and accepted by the appellee in the same condition it was when signed by the appellant. The face of the instrument was plain, as to the terms upon which the appellant had agreed to become liable.

The bond purported to be the bond of those who never executed it, and gave every evidence to the holder that it was an incomplete instrument. He saw the names of the parties signed to the instrument, and knew the character of the undertaking; and, as an ordinarily prudent man should have made inquiry, to know why it was that the names of these parties were in the bond as sureties, and not signed so as to make it their obligation.

The names had not been erased, and no blank left in the paper, or any other evidence on its face indicating that they were not to become bound. If the principal had stated that the appellant had waived his right to have them sign the paper, it would have been in direct conflict with the writing itself that was at the time delivered and accepted. The extent of the liability was plain—*unmistakable*—and was notice to the obligee of the condition upon which the appellant agreed to become bound

In the case of Fletcher v. Austin, 11 Vt. 447, it was held: "Where a bond contains in the obligatory part, the names of several persons as sureties, if a part sign with the understanding and on the condition that it is not to be delivered to the obligee until signed by the others, it is not effectual as to those who do sign, until the condition is complied with. The obligee must inquire whether those who have signed consent to its being delivered without the signature of the others." In the case of Sharp v. United States, 4 Watts 23, it is said: "His (the surety's) signature is conditional, and unless it be shown that the condition, viz., the execution of the bond by William Laughlin, whose name appears in *the body of it*, has been dispensed with by him, he has a good defense to the suit." Cutler v. Roberts, 4 Neb.; Duncan v. United States, 7 Pet. 435.

The conditions upon which appellant signed the bond having been pleaded and established, the bond on its face was notice to the appellee, and there being no proof of a waiver of his contract in order that other names might be substituted in lieu of those who failed to sign, a judgment should have been rendered for the appellant on the special finding. The judgment below as to Hobbs is therefore reversed and the cause remanded, with directions to render a judgment in his favor.

As to the other appellants, their defense is based on the general plea of *non est factum*, with an additional defense controverting the fact of the collection of the money by their principal and their liability therefor. Under the general plea of *non est factum* the question as to the conditional signing and delivery of the writing cannot be considered, and the remaining inquiry as to these appellants arises on the instructions. The petition we regard as presenting a cause of action, and the breach of the covenant alleged is the collection of the money by the principal and his failure to pay it to the appellee. The breach is that the *deputy failed to account for and pay over to his principal* (the plaintiff) moneys collected by him.

The instructions given at the instance of the appellee authorized a finding against appellants, not only for the moneys, collected by their principal, but for moneys that he might have collected on claims in his hands. This was erroneous, as the only breach alleged was his failure to account for and pay over the money collected by him.

The fact that appellee was permitted to look to a paper in his possession to refresh his memory as to the existence of certain facts, did not prejudice the appellants. He did not derive his knowledge from the writing, but merely resorted to it to enable him to state more correctly the dates and amounts of claims about which he was testifying. There are other errors not complained of that will not be considered, as they do not, if conceded to exist, affect the substantial rights of the parties.

Judgment reversed and cause remanded, with directions to award the appellants, Minor Hall and Wolfe's administrator a new trial, and for further proceedings consistent with this opinion.

NOTE.—See State v. Potter, 4 Cent. L. J. 85, and note thereto.

DIGEST OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

October Term, 1878.

PRIVILEGE OF JUROR TO REFUSE TO ANSWER QUESTIONS CRIMINATING HIMSELF.—Among the errors assigned in this case was a ruling of the lower court to the effect that a certain Henry Holmes, called to be a juror in this case, was not obliged to answer any questions touching his qualifications as a juror, under sec. 820 of the Revised Statutes. Under this ruling, Holmes declined to say whether he did or did not participate in the rebelion. He was challenged on the ground that he was disqualified under the aforesaid section of the Revised Statutes, and the court overruled the challenge. Upon this point this court holds that a juror is no more obliged than a witness to disclose on oath his guilt of any crime, or of any act which would disclose on his oath his guilt of crime, or of any act whfch would render him infamous, in order to test his qualifications as a juror. The questions asked him, if answered in the affirmative, would have convicted him of the crime of treason. Whether pardoned by a general amnesty or not, the crime was one which, in the opinion of this court, he could not be required to disclose in this manner. If he were guilty the challenger had the right to prove it by any other competent testimony. As he did not offer to do this, and as the juror's incompetency was not proven, the court was not bound to exclude him.—*Burt v. Bonjoud.* In error to the Circuit Court of the United States for the Northern District of Florida. Opinion by Mr. Justice MILLER. Mr. Justice STRONG dissenting. Mr. Justice FIELD concurring; " I agree with the court that the juror Holmes, in this case, can not be required to answer the questions put to him, but I go further. I do not think that the act of Congress, which, by requiring a test oath as to past conduct excludes a great majority of the citizens of half of the country from the jury-box, is valid. In my judgment, the act is not only oppressive and odious, and repugnant to the spirit of our institutions, but is clearly unconstitutional and void. As a war measure to be enforced in the insurgent States, when denominated by the National forces, the act could be sustained, but after the war was over and the insurgent States were restored to their normal and constitutional relations to the Union, it was as much out of place and as inoperative as would be a law quartering a soldier in every Southern man's house." Judgment affirmed.

BONDS—NEGOTIABLE INSTRUMENTS — PLACE OF PAYMENT IN BLANK.—In an action on the bonds of a railway company it appeared that the bonds in suit were never issued by the company, but were stolen or taken by force from the custody of the company, and were sold to the plaintiff with several unpaid interest coupons attached for some ten to fifteen cents on the dollar. Each bond provided that the company "is indebted to John Ray or bearer for value received, in the sum of either two hundred and twenty-five pounds sterling, or one thousand dollars lawful money of the United States, to wit: two hundred and twenty-five pounds sterling if the principal and interest are payable in London, and one thousand dollars lawful money of the United States if the principal and interest are payable in New York," etc. Each bond declared that the president of the company was authorized by his indorsement to fix the place of payment. There was on the bonds in suit a blank indorsement to be used in fixing the place of payment, but it was not filled up or signed. The resolution of the board of directors authorizing the execution of the mortgage and the issue of the bond specified that the principal and interest of the bond were to be made payable in London or New York, as the president by his indorsement should specify. *Held*, that the bonds were not negotiable, and that the plaintiff was not a *bona fide* purchaser. The court said: "The uncertainty of the amount payable in the absence of the required indorsement is, of itself, a defect which deprives these instruments of the character of negotiability As they stand they amount to a promise to pay so many pounds or so many dollars —without saying which. One of the first rules in regard to negotiable paper is that the amount to be paid must be certain, and not be made to depend on a contingency. 1 Daniel's Negotiable Instruments, § 53. And although it is held that *id certum est quod certum reddi potest*—a maxim which would have given the bonds negotiability in this instance, had the requisite indorsement been made; yet, without such indorsement, the uncertainty remains, and operates as an instrinsic defect in the security itself. Now it is shown by the master's report, and if it were necessary to go behind the report the evidence shows, that these bonds were never issued by the railroad company at all, but were seized and carried off by a raid of soldiers during the war. They afterwards turned up in New York, and were purchased by the appellants; and the question is, whether the fact that the past-due coupons were still attached, and that no place of payment was indorsed ou the bonds themselves, was sufficient to put the appellants upon inquiry as to their validity, and as to the *bona fides* of their issue; these marks of suspicion being supplemented by the further fact that the bonds were offered for a very small consideration. Our opinion is, that the appellants had abundant cause to question the integrity of these bonds, that they were affected with notice of their invalidity, and can not be allowed to sustain the position of *bona fide* holders without notice. The presence of the past-due and unpaid coupons was itself an evidence of dishonor, and sufficient to put the purchasers on inquiry. The imperfection as to the place of payment is another strong evidence of the want of genuineness. Of course, it is not necessary to the validity of a bond that it should name a place of payment; but these bonds expressly declare that they are to be payable at the place which should be determined by the president's indorsement, and that the sum payable should depend on that indorsement; and yet no indorsement appears thereon. We do not say that this defect would have invalidated the bonds if they had in fact been issued by the company, and the amount had been certain; but it was a pregnant warning to the purchasers to inquire whether they had been issued or not. These facts, taken in connection with the price at which the bonds were offered, were abundantly sufficient to affect the purchasers with notice of any invalidity in their issue. The case is so plain that it is hardly necessary to cite any authorities on the subject. 'A person who takes a bill,' said this court in Andrews v. Pond, 13 Pet. 79, 'which upon the face of it was dishonored, can not be allowed to claim the privileges which belong to a *bona fide* holder without notice.' The same doctrine is re-affirmed in Fowler v. Brantley, 14 Pet. 321; and, indeed, is elementary law. The circumstances in this case went further than merely to cast a shade of suspicion upon the bonds; they were so pointed and emphatic as to be *prima facie* inconsistent with any other view than that there was something wrong in the title. See 1 Daniel's Neg. Inst. § 796."—*Parsons v. Jackson.* Appeal from the Circuit Court of the United States for the District of Louisiana. Opinion by Mr. Justice BRADLEY. 19 Alb. L. J. 379.

SOME RECENT FOREIGN DECISIONS.

RAILROAD — ADJOINING LANDOWNER—RIGHT TO LIGHT AND AIR—NUISANCE— SUPERFLUOUS LAND —ADVERSE POSSESSION. — *Norton v. London, etc. R. Co.* English High Court, Chy. Div. 27 W. R. 352. 1. The owner of land adjoining a railway on both sides has a right to light and air across the railway. 2. A railway company is bound to use its statutory powers as far as possible without injury to the adjoining land owners. 3. Although a railway company acquires the fee simple in land taken by it, the rights of neighboring land owners are only so far curtailed as is necessary for the purposes of the railway. An adjoining owner may acquire land of the company by adverse possession.

LANDLORD AND TENANT—BUILDING AGREEMENT —RENT—*Adams v. Hagger.* English High Court, Q. B. Div. 27 W. R. 402. A clause in a building agreement that until the lease is executed the intended lessee shall hold the land at the rent and subject to the conditions to be contained in the lease, creates a liability on the part of the intended lessee to pay the sum reserved by way of rent, although no tenancy has actually existed. Taking possession by the lessee is not a condition precedent to his liability.

CONTRACT INDUCED BY FRAUD — FALSE PRETENSES — CONVICTION OF VENDEE — INNOCENT TRANSFEREE FOR VALUE—EFFECT OF 24 & 25 VICT. CH. 96, SEC. 100.—*Moyce v, Newington.* English High Court, Q. B. Div. 27 W. R. 319. 1. Where a seller is induced to sell by the fraud and false pretenses of the buyer, though it is competent to the seller by reason of such fraud to avoid the contract, yet, till he does some act to avoid it the property remains in the buyer, and if he in the meantime has parted with the thing sold to an innocent purchaser, the title of the latter can not be defeated by the original seller. 2. The 24 & 25 Vict. ch. 96, sec. 100, which enacts that where property has been obtained, *inter alia*, by false pretenses, on the conviction of the party so obtaining it, restitution shall be made to the party from whom it has been so obtained, applies only to cases in which possession has been obtained without the property passing. 4. W, by fraud and false pretenses, induced N to sell him a flock of sheep. W subsequently sold the sheep to M, who bought *bona fide* and for valuable consideration, and removed them to his own premises. N, on discovering the fraud, retook possession of the sheep. W was prosecuted by N for obtaining the sheep by false pretenses and convicted. At the time of the conviction no order of restitution under 24 & 25 Vict. ch. 96, sec. 100, was made, as the sheep were then in the possession of N. In an action by M against N for the value of the sheep: *Held*, that N's contract with W was not void but voidable only and subject to M's rights subsequently acquired, and, therefore, thot M's title to the sheep was good.

CORPORATION—RIGHT OF ACTION FOR IMPROPER EXCLUSION OF DIRECTOR FROM MEETINGS.—*Pulbrook v. Richmond Mining Co.* English High Court, Chy. Div, 27 W. R. 377. A director improperly excluded from meetings by his co-directors has an individual right of action against them for injury caused to him by such exclusion. JESSEL, M. R.: "This motion raises a question of importance, viz.: whether a director who is improperly excluded by his brother directors from the board is entitled to an order restraining his brother directors from so excluding him. As a director, he is entitled to certain fees, and it is doubtful whether he could claim such fees if he did not attend meetings. Therefore, it seems to me, his exclusion is an individual wrong, and an invasion of his legal rights for which the directors are personally liable. He has a right to take a part in the management of the company and to vote at the meetings, and a right to know what takes place at the meetings, because it has sometimes been held that a director not attending is liable for what is done. Besides, he is in the position of a managing partner, and has a right to remain so and to receive remuneration for his services. Therefore, for the injury done him by excluding him from the meetings, he has a right to sue; and when the decisions say that when a wrong is done to the company by excluding a director from board meetings, the company must sue, that is for a wrong done to the company, and not for one done to the individual. It may happen that the wrong is done to both; but in the case of an individual wrong a shareholder can not, on behalf of himself and others, not sufferers by the wrong, maintain an action for that wrong. Therefore the plaintiff here has a right of action."

LIBEL— CRIMINAL INFORMATION AGAINST PROPRIETORS OF NEWSPAPER — WHAT IS AUTHORITY TO EDITOR TO PUBLISH LIBEL — PROTECTION OF PROPRIETOR UNDER STATUTE.— *Queen v. Holbrook.* English High Court, Q. B. Div. 27 W. R. 313. H and two others were joint proprietors of a newspaper, and each of them took the management of a particular department other than the literary. This department was intrusted to an editor who inserted in it what he thought fit in the way of articles, correspondence, etc. Upon the trial of an information against the three proprietors for a libel which appeared in the newspaper, it was proved that at the time of publication of the libel, one of them was absent from home on account of ill-health, and that neither of them had given any authority for, or consent to, the publication complained of, or had any knowledge of the libelous article until his attention was called to it after the paper was in circulation. The learned judge left the question, whether the libel was published without the authority of the defendants within the meaning of the act 6 & 7 Vict. ch. 96, sec. 7, to the jury, but without explaining the meaning of that section as laid down in the judgment of the majority of the court on the former application for a new trial. 26 W. R. 144, L. R. 3 Q. B. D. 60. The jury found all the defendants guilty. *Held* (Per COCKBURN, C. J. and LUSH, J., MELLOR, J., diss.), that this was a misdirection. The judge ought to have explained to the jury that a general authority to an editor to conduct the business of a newspaper, must be taken, in the absence of anything to give it a different character, to mean an authority to conduct it according to law. The verdict must have proceeded on the ground of authority, as it included the third partner, who was absent on account of illness, as to whom there was no case to go to the jury. The previous judgment in this case (26 W. R. 144, L. R. 3 Q. B. D. 90) followed, Per Cockburn, C. J., and Lush, J. Per MELLOR, J., that his former judgment (in which also he dissented from that of the majority of the court) was wrong in this respect only, namely, in holding that the judge was right in withdrawing the evidence from the consideration of the jury. Per LUSH, J.—If the paper was a calumnious paper, its general character would negative the ordinary presumption of innocent intention, and fairly lead to the inference that the proprietor authorized the insertion of slanderous articles.

A novel machine for recording deeds has been invented in Ireland. It has been approved by a Parliamentary committee.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF OHIO.

December Term, 1878.

[Filed April 22, 1879.]

CORPORATION — CHARTER SUBJECT TO SUBSEQUENT LEGISLATION.—1. Where a corporation acting under a special charter, is invested with franchises to be exercised to subserve the public interest, the terms upon which the corporation may be required to discharge its duties to the public are subject to legislative supervision and control, unless it clearly appears from the terms of its charter that it was the intention to exempt it from such interference. 2. Under a special charter granted prior to the adoption of the present constitution, the defendant was empowered to "manufacture and sell gas" for the purpose of lighting the city of Columbus. The grant was exclusive for the term of twenty years. The charter contained no provision as to the price to be charged for gas, nor on the subject of meters. *Held*, that the defendant was subject to the provisions of the act of March 9, 1867 (S. & S. 160), restricting the price to be charged for the use of meters. Opinion by WHITE, J.—*State v. Columbus Gas Co.*

CORPORATION — SUBSCRIPTION — ASSESSMENT—FRAUD.—1. When ten per cent. of the capital stock of a railroad company has been subscribed, and the corporation has been fully organized under the general acts relating to railroad companies, assessments on subscriptions to the capital stock may be made and enforced, although the whole amount of such stock, mentioned in the certificate of incorporation, may not have been subscribed. 2. If a statute in force at the time a subscription to the capital stock of a railroad company is made, authorizes an extension of the road, the subsequent exercise of such power by the company will not affect the subscription. 3. Where a railroad company changes a terminus of its road from one county into an adjoining county, under the act of 1872 (69 Ohio Laws, 163), the mere fact that the route to the new terminus, selected by the company, passes through a portion of a third county, will not invalidate existing subscriptions to the capital stock. 4. Where one having possession of an agreement to take shares in the capital stock of a corporation, after subscribing in good faith for shares of such stock, induces others to subscribe on the faith of his subscription, and, subsequently, without the knowledge of the other subscribers, alters the paper by reducing the number of his shares, and delivers the instrument in that condition to the secretary, who is also a director of the company, this will not affect the liability of one thus induced to subscribe, although, at the time of such delivery, the person making the alteration explains the same to the secretary, who makes no objection thereto. Judgment affirmed. Opinion by WHITE, J.—*Jewett v. Valley R. Co.*

SUPREME COURT OF WISCONSIN.

March 1879.

DIVORCE — PARTIES—JOINDER OF ACTIONS.—1. Where the complaint states facts warranting a judgment for divorce and alimony, and not facts warranting an annulling of the marriage, and the prayer is for both forms of relief, the action is treated as one for divorce and alimony. 2. In an action by the wife for divorce and alimony, a third person may be made a party where that is necessary in order to protect the right of the wife. Damon v. Damon, 28 Wis. 510. 3. Where a woman marries after bringing an action for slander, the right of action will survive to her in case of her husband's death, or in case of her divorce from him. 4. The complaint in an action for divorce and alimony makes X a defendant, and alleges that plaintiff before her marriage had a valuable cause of action in slander against X; that such action for slander was pending at the time of the marriage, and is still pending and undetermined; that the husband has willfully deserted her, refuses longer to provide for her and their child, and has no property; and that, in fraud of her rights, he has released, or is threatening to release her right of action in slander to X, who is confederating with him for that purpose. Part of the relief sought is, that defendants may be restrained from taking any proceedings in the slander suit until this action for divorce shall be determined, and that any release by the husband to X of the right of action for slander may be adjudged void by the judgment herein. *Held*, on demurrer by X, that there is a cause of action stated against him, and no misjoinder of causes. Opinion by TAYLOR, J. RYAN, C. J., dissenting.—*Gibson v. Gibson.*

RAILROAD — NEGLIGENCE — LIABILITY TO SERVANTS.—1. Where a railroad company uses for the running of its trains a track belonging to another person, it is liable for injuries to its employees resulting from the unfitness of the track for such use. 2. In a suit against a railroad company for injury to an employee, where no recovery can be had for negligence of a co-employee, if defendant's use of the track alleged to have been insufficient was only occasional and for special purposes, and under special instructions to those in charge of trains as to the manner of running thereon, it is liable only in case it was negligence to use the track in that manner and for those purposes. 3. The injury in this case having been received in the State of Illinois, the court erred in taking from the jury the question whether the injury was caused by negligence of the defendant company or by that of plaintiff's co-employee, the conductor of the train, there being evidence for the jury on that question. 4. If, however, the injury was caused by negligence of the defendant company, a recovery will not be defeated by the merely contributory negligence of a co-employee, but only by that of the plaintiff himself, or of some person for whose acts he is responsible. Opinion by TAYLOR, J.—*Stetler v. Chicago, etc. R. Co.*

SUPREME COURT OF IOWA.

March Term, 1879.

PRACTICE — MISJOINDER OF PARTIES — SCHOOL DISTRICTS.—Several school districts can not join as plaintiffs in an action against another district in the same township to recover for money which was raised by tax upon all, but expended for the sole benefit of the defendant district. They must bring separate actions for the several sums claimed by them. Opinion by ROTHROCK, J.—*Independent District No. 1 v. Independent District No. 2.*

JURISDICTION—REPLEVIN OF PROPERTY IN CUSTODY OF ANOTHER COURT. — Action of replevin brought in the district court to recover possession of property held by the sheriff under process from the

circuit court. *Held*, that a demurrer to the petition on the ground that it showed the property to be under the exclusive jurisdiction of the court was not well taken. The circuit and district courts of the State are co-ordinate tribunals created by the same power, and there is not the reason for jealously guarding them from interference with each other in matters of jurisdiction that exists between the Federal and State courts. Opinion by ADAMS, J.—*Seaton v. Higgins.*

CONTRACT — PERFORMANCE OF PRIOR CONTRACT NOT A VALUABLE CONSIDERATION.—Q & Co. contracted to construct a certain portion of defendant's road, to be completed by a time specified. They became insolvent before the completion of the work, and represented to defendant that it was impossible for them to fulfill the contract, not being able to obtain credit for the bills necessary to be contracted in prosecuting the work, upon which defendant, by its vice-president, requested them to proceed with the work in their name, promising to become responsible for all bills and expenses, and pay all legitimate cost of the construction of the road. In an action against the defendant upon such promise by those holding claims against Q & Co.: *Held*, that the promise was without consideration. The fact that the completion of the road by the time specified in the contract was of great value to the defendant, by enabling it to collect a subscription which would otherwise have been forfeited, and that such early completion was secured by the promise would not constitute it a valid consideration, as the defendant only secured what it was legally entitled to and could have enforced under its contract. Opinion by DAY, J.—*Ayres v. Chicago, etc. R. Co.*

ELECTION— ILLEGAL BALLOTS — CONSTRUCTION OF STATUTE.—Section 627 of the code of Iowa, in regard to elections, provides: "If the ballots for any officer are found to exceed the number of voters in the poll lists, that fact shall be certified, with the number of the excess in the return, and if it be found that the vote of the precinct, where the error occurred, would change the result in relation to a county officer, if the person elected were deprived of so many votes, then the election shall be set aside as to him in the precinct where such excess occurred, and a new election ordered therein; * * * * but if the error occurs in relation to a township officer, the trustees may order a new election or not at their discretion. If the error be in relation to a district or State officer, the error and the number of the excess are to be certified to the State canvassers." * * * The plaintiff was a candidate for county treasurer. In one precinct of the county there were 318 ballots cast, while there were but 315 names on the poll lists. There were, however, but 315 ballots cast for the office of county treasurer. Plaintiff's opponent was elected by a majority of two in the county, and this action was brought for a writ of *mandamus* to compel a new election for treasurer in said precinct: *Held*, that there being no excess of ballots casts for candidates to fill that particular office, no new election could, under the above statute, be ordered. Opinion by SEEVERS, J.—*Rankin v. Pitkin.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

January-March, 1879.

MISNOMER—AMENDMENT.—1. The middle name or initial is an essential part of a person's name. Com. v. Hall, 3 Pick. 262; Com. v. Shearman, 11 Cush. 546; Com. v. McAvoy, 16 Gray, 235. 2. A misnomer by leaving out the middle name or initial can not be taken advantage of by the principal defendant in trustee process, who has been duly served and has suffered a default, and may, as between him and the plaintiff. be amended at the discretion of the court. Trull v. Howland, 10 Cush. 109; Crafts v. Sykes, 4 Gray, 196; Langmaid v. Puffer, 7 Gray, 378. 3. But amendments can not affect intervening rights of third persons. Opinion by GRAY, C. J.—*Terry v. Sisson.*

REFUSAL TO PLEAD—OMISSION TO MAKE FORMAL ENTRY OF.—The Gen. Stats. ch. 171, § 29, provide that, if on arraignment a person refuses to plead, "the court shall order a plea of not guilty to be entered, and thereupon the proceedings shall be the same as if he had pleaded not guilty." The defendant having had full opportunity to plead in the district court, and refused to do so, was by this statute to be tried as if he had pleaded not guilty, and having been so tried the formal entry of such a plea upon the record did not prejudice him and was no error. Ellenwood v. Com., 10 Met. 222; Harris' Case, Cro. Jac. 602. Opinion by GRAY, C. J.—*Com. v. McKenna.*

PERSONAL PROPERTY — TENANCY IN COMMON.—The defendant W proposed that the plaintiff should join him in the purchase of a trotting horse, to which the plaintiff assented, and W bought the horse, and the plaintiff paid him one-half of the purchase-money. They thereupon agreed that either of them having possession of said horse should provide for its keeping without cost to the other, and that each should offer it for sale and endeavor to procure a buyer at a profit over its costs, but neither should sell without concurrence of the other. After being in possession of each at intervals, the horse was put by W in the stable of the defendant M, a teamster, and the cost of its keeping by M having become greater than W could pay, it was sold by M by authority of W, and from the proceeds M retained the cost of its keeping, and paid the balance to W, said sale being without the knowledge or consent of the plaintiff, and without any reservation of his half interest. *Held*, that the plaintiff and W were owners as tenants in common of the horse; that the facts shown did not constitute a partnership in reference to the title to the horse; that neither party had a lien upon the share of the other for the expenses incurred; that M had no lien upon him for the keeping. Goodrich v. Willard, 7 Gray, 183; and that the sale by the concurrence of both defendants was in itself a conversion of the part of the horse owned by the plaintiff without any subsequent demand, which was proved. Opinion by LORD, J.—*Goell v. Morse.*

INDICTMENT— NEGLIGENCE — EVIDENCE.—Under an indictment against a railway corporation which charged a killing of a person at a grade crossing by reason of the unfitness and gross negligence and carelessness of the servants of defendant while engaged in its business, the only negligence alleged was that the servants who were running an engine ran it "rashly and without watch, care or foresight, and with great, unusual, unreasonable, and improper speed." *Held*, that evidence that the servants did not ring the bell or sound the whistle as required to do at grade crossings, or that they did not reasonably close the gate at the crossing, though competent upon the issue whether the person killed was using due care, was incompetent and could not be considered by the jury upon the issue of the gross negligence of the defendant's servants. The only negligence sufficiently charged is that the servants ran the engine with great, unusual, unreasonsonable and improper speed. The addition of the words "rashly and without watch, care or foresight," can not enlarge the allegation so as to make it equivalent to an averment that the servants neglected to ring the bell or sound the whistle. It does not inform the defendant with reasonable certainty that such negli-

gence is intended to be charged. Opinion by MORTON, J.—*Com v. Fitchburg R. Co.*

SUPREME COURT OF INDIANA.

November Term, 1878.

SALE OF LIQUOR WITHOUT LICENSE — HOW LEGALIZED.—A sale of liquor made by a party who has been granted a license, but before he has paid the license fee is unlawful, and if prosecuted for such sale before payment of such fee the party would be liable. But after he has paid the fee and obtained his license which covered the day on which the sale was made, the sale which before had been illegal was thereby legalized and the offense pardoned. Judgment reversed.—*Vannoy v. State.*

PLEADING—NEGLIGENCE—OBSTRUCTION OF HIGHWAY.—This was an action by Barnett against Perry for damages in causing the death of two mules by placing "a pile of wooden timbers, intended to serve as a bridge," upon a highway. The evidence showed that the defendant was a road supervisor, and had constructed a bridge over a bayou, and that when plaintiff attempted to cross his mules fell through or over the bridge, and were killed. The bridge was carelessly built and not kept in proper repair. WORDEN, J., said; "The theory of the complaint is that the defendant carelessly and willfully placed an obstruction in the highway. The evidence does not show such obstruction. If the defendant was guilty of any wrong, it was in this that he failed as such supervisor to put or keep the bridge in a proper condition to make it reasonably safe; and if he is liable in an action at all in the premises it is for failure to discharge his official duty in that respect. It need not be determined in this case whether he would be liable to such action or not. That would depend upon the powers conferred and the duties imposed upon him, and the means at his command to perform the duties imposed. 60 Ind. 580. The complaint was not proved in its general scope and meaning." Judgment reversed.—*Perry v. Barnett.*

REAL ESTATE—RIGHTS OF PURCHASER WITHOUT NOTICE OF AN IMPLIED TRUST.—This was an action to recover possession of and quiet title to real estate. The facts are as follows: In 1863, William, son of Thomas and Jane Fall, entered the United States army. He was to send his mother all the money he might receive, which she was to invest for him in real estate. She thus received and invested for him some $600, taking the title to the real estate in her own name. Subsequently, she and her husband mortgaged the real estate to one Vawter, who had notice of the equitable claim of William Fall to the real estate. Vawter assigned part of the mortgage debt to Hampson, who had no notice of the facts, and he foreclosed the mortgage, and in due time received a deed to the real estate from the sheriff. Hampson brought this suit to quiet his title, and the defendant Fall had judgment in his favor below. PERKINS, J., said: "Where the trustee of the party purchases land and takes the title in his own name, and pays for it with the money of the *cestui que trust*, such trustee holds the land by implication in trust for him whose money was used to pay for it: and this even though the trustee be a married woman. 1 Perry Trusts, sec. 48; 37 Ind. 469: 42 Ind. 92; 18 Wall. 332. The land in controversy was conveyed by such a trustee, by way of mortgage, to Vawter, and he having at the time notice of the trust, his title was affected by it. But 'no such trust, whether implied or created, shall defeat the title of the purchaser for a valuable consideration, and without notice of the trust' (1 Rev. Stats. 1876, 915, sec. 2), and a purchaser without notice from a purchaser with notice is protected; for his own good faith is a defense, and the bad faith of a vendor, like the bad faith of the original trustee in making the sale, can not injure an innocent party. The purchase of Hampson falls within this principle. The appellant purchased a specific mortgage lien, created by the act of the person whom the public records showed to be the legal owner, and who was in possession of the property. The mortgage was a conveyance of an interest in that real estate, and the appellant purchased the interest conveyed by the mortgage in good faith, relying on the public record and the possession of the mortgagor for title, without notice of any trust, and for a valuable consideration. The case falls within the provision of the statute above quoted." Judgment reversed.— *Hampson v. Fall.*

SUPREME COURT OF PENNSYLVANIA.

January—March 1879.

MORTGAGE—PERSONAL LIABILITY OF VENDEE OF LAND "UNDER AND SUBJECT" TO A MORTGAGE—EVIDENCE—PAROL EVIDENCE TO VARY THE DEED—EFFECT OF CONVEYANCE FOR SPECIFIC PURPOSE, AND RECONVEYANCE.—1. The grantee of the property "under and subject to a mortgage," taking the title for the purpose of accomplishing a specific object, and upon completion thereof reconveying to his grantor, in pursuance of a parol agreement, is not personally liable for the mortgage debt, by reason of the "under and subject" clause in his deed. Girard Life Ins Co. v. Stewart, 5 W. N. 87, followed. 2. Parol evidence is admissible to vary the legal effect of the "under and subject" clause in the deed. 3. In an action of assumpsit by the assignee of a mortgage to recover a balance due after a sheriff's sale of the mortgaged property, the defendant pleaded specially that the property had, in pursuance of a parol agreement, been conveyed to him by the mortgagor for the use and benefit of the mortgagor, and for the sole purpose of completing in his behalf the erection of a dwelling-house thereon, which the mortgagor, being at the time insolvent, was unable to do; that the purpose of the conveyance was accomplished, and the property having been reconveyed to the mortgagor, was by him conveyed under and subject to said mortgage, and again by his grantee to the owner at the time of the sheriff's sale, and prior to the assignment of the mortgage to the plaintiff. On demurrer to the special plea: *Held*, sustaining the court below, that the plea was good. Opinion PER CURIAM.—*Stokes v. Williams*, 6 W. N. 473.

CONSTITUTIONAL LAW — WRITS OF ERROR AND CERTIORARI IN CAPITAL CASES—POWER OF LEGISLATURE TO DIRECT MODE OF EXERCISING RIGHTS SECURED BY THE CONSTITUTION—MURDER IN THE FIRST DEGREE—INSANITY—DEGREE OF PROOF NECESSARY TO ESTABLISH — EVIDENCE.— 1. Although the constitution of 1874 entitles the prisoner to a writ of error in a certain class of criminal cases as a writ of right, the legislature still has the power to declare in what mode that right shall be exercised, provided it does not unreasonably obstruct or interfere with the exercise of the right. The act of 24th of March, 1877, (P. L. 40), limiting the time of taking out a writ of error or certiarari in capital cases to twenty days from

the date of sentence is constitutional. The history of writs of error in criminal cases in Pennsylvania reviewed. 2. On the trial, a juror was called as Joseph Dugan, 1001 Lemon st.; his real name was Joseph Dougan, his residence 1008 Lemon st., and he had a son Josepn Dougan; a challenge for cause by the prisoner was overruled; the prisoner did not exhaust the peremptory challenges allowed him by law: *Held*, that the overruling his challenge was not error. 3. The court properly refused to admit evidence that the deceased, after the infliction of the fatal wound, said: "My husband shot me, but I don't want him punished," offered for the purpose of showing that she believed him to be insane, and not accountable for his actions. 4. Evidence that the prisoner and the deceased about two years before the murder had a quarrel, in which the deceased was thrown down stairs, following evidence of general domestic infelicity, is admissible for the purpose of showing motive and malice on the part of the prisoner. 5. Letters of the accused ten years old are admissible in rebuttal of the plea of insanity, where the prisoner's evidence of insanity runs over the whole period of his life. 6. The prisoner, though separated from his wife for several years, a few days before the shooting offered, as he had repeatedly done before, to return to her; she refused to receive him; the bank deposit books of the prisoner and the deceased, showing that the former had not and the latter had money, were admitted in evidence for the purpose of showing a motive for the prisoner's desire to return to his wife. *Held*, that such evidence was properly admitted. 7. The court charged the jury, *inter alia*, as follows: "As the law presumes sanity to be the normal condition of the prisoner, and insanity an abnormal condition, the burden rests on him to prove his insanity as an excuse * * * The evidence, therefore, which is intended to establish this defence must be satisfactory to the jury, and the conclusion, such as fairly results from the evidence." *Held*, not to be error. —Opinion by PAXSON, J. *Sayers v. Com.*

BOOK NOTICES.

INSTITUTES OF COMMON AND STATUTE LAW. By JOHN B. MINOR, LL. D., Professor of Common and Statute Law in the University of Virginia. Richmond, 1879. Sold by M. McKennie, University of Virginia. Vol. IV. In two parts.

The first and second volumes of this extensive work appeared about two years ago; that the fourth volume should precede the third, is explained as occasioned by the exigencies of the author's business as a public teacher of law. Volume III, which is to treat of the rights which relate to things personal, will, it is expected, be ready for publication before the end of this year.

The present volume is devoted to the practice of the law in civil cases including the subject of pleading; and it takes two parts—one of 800 and the other of 900 pages—to contain the learning which is presented by the author on this branch of his work. On the appearance of the first two volumes, the plan and execution of this exhaustive undertaking were noticed in these columns (see 4 Cent. L. J. 472), and it is, therefore, not necessary to again review it. The last volume is entitled to all the praise which the first volume everywhere received.

REPORTS OF CASES IN LAW AND EQUITY, determined in the Supreme Court of the State of Iowa. By JOHN S. RUNNELLS, Reporter. Volume XLVII. Des Moines: Mills & Co. 1879.

The cases reported in this volume were decided at the December term of the year 1877, and the June term of 1878, of the Supreme Court of Iowa. Over 200 cases appear, the volume containing about 700 pages. The tenth volume of Mr. Runnells' series maintains his reputation as a careful and trustworthy reporter.

Several of the cases have already appeared in these columns, the most important of these being the decision in *Schroeder v. Chicago, etc., R. Co.*, 6 Cent. L. J. 47, where it was held that in an action for damages for personal injuries, the plaintiff may be required by the court, on application of the defendant, to submit his person to an examination, for the purpose of ascertaining the character of his injuries. Evidence of this character would certainly seem to be proper, and to be the best evidence attainable of the extent of alleged injuries. But the rule is otherwise in Missouri.

The other decisions on questions of general interest in this volume are the following:

A witness may state whether or not, in his opinion, a person was intoxicated, and is not confined to a statement of the conduct and demeanor of the party: *State v. Huxford*. A wife has power to ratify a defective and void conveyance of her homestead wherever her husband could ratify such an act: *Spafford v. Warren*. The settlement of a pauper is not affected by his insanity: *Washington Co. v. Mahaska Co.* The arrest and detention in another county of a prisoner who is under bond for appearance, does not release his sureties: *State v. Merrihew*. A contract not in general restraint of trade, but simply in restraint of it as to particular places or persons, and for a limited time, is valid, and the beneficial interest in it may be assigned: *Hedge v. Lowe*. Authority to an agent to insert in a deed the name of the grantee, may be given by parol: *Swartz v. Ballou*. An attorney who tenders himself as a surety on a bond, and is accepted by the proper officer, can not afterwards plead his disability to relieve himself from his obligation, even though it is provided by statute that "no attorney shall be received as security in any proceeding in court:" *Wright v. Schmidt*. A soliciting agent of an insurance company is the agent of the company, and not of the insured, even though the policy states otherwise: *Boetcher v. Hawkeye Ins. Co.* A contract of an attorney to pay any judgment which shall be finally rendered against his client in a certain case, in consideration that the latter will appeal it, and pay the former a stipulated fee, is void: *Adye v. Hanna*. The *gravamen* of the action for *crim. con.* is the criminal conversation, and the husband can not, if he fail to prove that, recover therein for the loss of his wife's society, even though caused by defendant: *Wood v. Matthews*. A husband permitting his wife to sue for expenses incurred while suffering from personal injuries, is estopped from afterwards claiming upon the same cause of action: *Neumeister v. City of Dubuque*. A railroad employee having recovered $4,000 for a broken leg, and it appearing to the supreme court that no permanent injury had been done, the amount was ordered to be reduced to $2,500: *Lombard v. Chicago, etc., R. Co.* In an action for damages for personal injuries, evidence showing that a short time before the injury the plaintiff effected an insurance on his life is not admissible to establish his previous good health: *Lee v. Town of Cresco*. Property of a guest of a hotel is not exempt from the lien of the landlord by reason of the fact that it is property which is exempt from general execution: *Swan v. Bournes*.

It is to be hoped that the decision of the court in *State v. Hardie*, p. 647, may have some effect in stopping to some extent the careless use of firearms. The defendant having found an old revolver which he thought was unloaded, undertook to frighten a female neighbor by snapping it at her, but the weapon happened to be charged, and a tragedy was the result. He was convicted of manslaughter, and the supreme court, in affirming the conviction, say: "If it (the revolver)

had been in fact unloaded, no homicide would have resulted, but the defendant would have been justly censurable for a most reckless and imprudent act in frightening a woman by pretending that it was loaded, and that he was about to discharge it at her. No jury would be warranted in finding that men of ordinary prudence could so conduct themselves; on the contrary, such conduct is grossly reckless and reprehensible, and without palliation or excuse. Human life is not to be sported with by the use of firearms, even though the person using them may have good reason to believe that the weapon used is not loaded, or that, being loaded, it will do no injury. When persons engage in such reckless sport, they should be held liable for the consequences of their acts."

QUERIES AND ANSWERS.

[The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.]

**** *The following queries received during the past week are respectfully submitted to our subscribers for solution, by request of the senders. It is particularly desired that any of our readers who have had similar cases, or have investigated the principles on which they depend, will take the trouble to forward an answer to as many of them as they are able.*

QUERIES.

24. REMOVAL OF CAUSES.—In Arthur v. New England Mut. Ins. Co., 8 Cent. L. J. 261, McKennan, J., of the United States Circuit Court for the Eastern District of Pennsylvania, in speaking of removal of causes under act of 1875, says: "The State court ceases to have jurisdiction upon the proper filing of the petition and bond. * * * The result is that the cause from that time is, *in theory*, in this court." What does this mean? The case is out of the State court; the papers are not in the Federal court: where is the case? I want a subpœna for witnesses or some other process, where will I get it? Can I get a writ from a court which has the case *in theory*? SUBSCRIBER.

25. WHAT IS THE MEANING of the word "acquaintance," as used in § 56, p. 646, as to justices and constables? R. S. Illinois, 1864. S. J. W.
Lincoln, Ill.

ANSWERS.

No. 21.

[8 Cent. L. J. 367.]

I would suggest the decision of the Kentucky Court of Appeals in Phipps v. Acton, 12 Bush. 375. "Infants' rights to the homestead do not depend upon occupancy, but continue until the youngest unmarried child arrives at full age." This is founded on the old Roman maxim and rule of law, that "an infant can do nothing to his own prejudice," and has no power to change his place of living, this power resting in his guardian. W. H. H.
Maysville, Ky.

[Similar answers to this query have been received from other correspondents. Dillard v. Hunt (Ky. Ct. of Appeals, March 27, 1874), is also suggested as in point.—ED. CENT. L. J.]

No. 17.

[8 Cent. L. J. 307.]

At common law, when individual property was owned by joint-tenants, and the tenants could not agree upon a joint use of it, the remedy was to allow each owner to use it alternately, as in the case of a piscary, one to have one draught, and the other the second; or of a mill, one to use it one day and the other the second. Coke upon Litt, (Thomas' ed.) Vol. I, top p. 795. And at first when the chancellor's aid was invoked, he decreed a use of the property in accordance with the rule laid down by Lord Coke, *supra*. Daniell's Chy. Pl. and Pr. (4th. ed.) Vol. II, p. 1157. This is an inadequate remedy, rendered so by the caprices of weather and many other casualities; it is mere lottery. And, besides being likely to produce inequalities, it has a tendency to aggravate the evil that partition is intended to cure; it leaves the property in possession of the joint owners, to be the subject of protracted dispute, whereas by a sale and partition each has his own to do with as he pleases. It is infinitely wiser to decree a sale and an equal division of the money. In accordance with this view, the chancellors of at least two States have done complete justice by decreeing a sale of personal property for the purpose of partition. Tinney v. Stebbins, 28 Barb. 290; Prather v. Davis, 13 Bush. 372. The ruling in these cases is founded in sound principles; for it is a fundamental rule in equity, that when the chancellor acquires jusisdiction of any subject he will afford a complete remedy. W. A. S.
Flemingsburg, Ky.

NOTES.

MR. HENRY A. CHANEY, the reporter of the Supreme Court of Michigan, has made a new departure in the publication of the reports of that State. Following the plan adopted in England, Ohio and New Jersey, the Michigan reports will hereafter appear in parts, thus avoiding, as far as possible, any great delay in placing the decisions of the court in the hands of the profession.——The British Parliament has adopted a resolution in favor of the abolition of actions for breach of promise of marriage, except where there has been actual pecuniary loss by reason of the breach of promise.——The death is announced of Dr. Isaac Butt, an eminent Irish lawyer, but better known as the leader of the Home Rule party in the English Parliament. He was born in 1815, called to the Irish bar in 1838, and in 1844, at the early age of twenty-nine years, was created a Queen's counsel. He took a leading part in the Irish State trials, and defended the Fenian prisoners with great ability, giving up a lucrative practice for many years, and devoting himself exclusively to their cause.——According to English judicial opinion, a woman can tell a lie better than a man. During a recent perjury trial, the counsel for the defense remarked that a woman would say anything. Baron Huddleston, in charging the jury, observed that he could not go so far as the counsel, but it was a well-known fact that a woman told a lie better than a man did. It was a remarkable circumstance that when a woman was determined to say that which was untrue, she did it a great deal better than a man. Whether it was that a man was more conscious of his dignity was a metaphysical question he could not answer; but it was certain that a woman did tell a story much more logically and perseveringly than a man could. He was glad that it was a question for the jury to say whether the girl should be believed, for he himself admitted his incapacity to gauge the veracity of a woman when she appeared in the box.